

LUKE W. COLE, California Bar No. 145,505  
CAROLINE FARRELL, California Bar No. 202,871  
BRENT J. NEWELL, California Bar No. 210,312  
Center on Race, Poverty & the Environment  
47 Kearny St, Suite 804  
San Francisco, CA 94108  
415/346-4179 • fax 415/346-8723

NANCY S. WAINWRIGHT, Alaska Bar No. 8711071  
Law Offices of Nancy S. Wainwright  
13030 Back Road, Suite 555  
Anchorage, AK 99515-3358  
907/345-5595 • fax 907/345-3629

Attorneys for Plaintiffs Enoch Adams, Jr., Leroy Adams, Andrew Koenig, Jerry Norton, David Swan and Joseph Swan

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

ENOCH ADAMS, JR., LEROY ADAMS,  
ANDREW KOENIG, JERRY NORTON  
DAVID SWAN and JOSEPH SWAN,

**Plaintiffs,**

V.

TECK COMINCO ALASKA INCORPORATED  
Defendant.

Case No. A04-49 (JWS)

PLAINTIFFS' OBJECTION  
TO NORTHWEST ARCTIC  
BOROUGH'S UNDISCLOSED  
WITNESS AND MOTION *IN  
LIMINE* TO EXCLUDE  
TESTIMONY OF WITNESS NOT  
TIMELY DISCLOSED  
(Fed. R. Civ. Proc. R. 26 and 37)

NANA REGIONAL CORPORATION and  
NORTHWEST ARCTIC BOROUGH,

## Intervenors-Defendants.

Pursuant to Federal Rules of Civil Procedure 26 and 37, Plaintiffs Enoch Adams, Jr., *et al.* (“Adams”), file this Objection to Intervenor-Defendant Northwest Arctic Borough’s (“Borough”) Final Witness List, filed January 22, 2008 and Motion *in Limine* to exclude the testimony of Mayor, Siikauraq Martha Whiting. Given the highly compressed schedule between the disclosure of witnesses and the filing deadline for these motions and objections, Adams has not been able to confer with the Borough about withdrawing Ms. Whiting as a witness, pursuant to Rule 37.

1     **I. FACTS**

2         This case was filed in March 2004. The Borough was allowed to intervene as a defendant  
 3 on June 7, 2004. Docket 18. On September 21, 2007, this Court issued its Pre-Trial Order.  
 4 Docket at 177. That Order stated that “On or before JANUARY 22, 2008, each party will serve  
 5 and file a final, revised witness list, *which may include only persons who have been previously*  
 6 *disclosed as potential witnesses in a timely filed prior witness list.*” Docket 177 at 2 (emphasis  
 7 added).

8         On January 22, 2008, the Borough filed a Final Witness List indicating its intention to  
 9 call the Borough’s Mayor, Siikauraq Martha Whiting, as its sole witness during the remedial  
 10 phase of this trial. However, the Borough has never previously filed a witness list, and never  
 11 previously named Ms. Whiting as a potential witness in this case. Not only did the Borough  
 12 ignore the explicit language of this Court’s Order of September 21, but it also ignored the  
 13 disclosure requirements of Rule 26 of the Federal Rules of Civil Procedure. The disclosure of a  
 14 previously un-named witness on the final day for submission of witnesses and exhibits is  
 15 untimely, prejudicial to Adams and without justification. As a result, the Borough should be  
 16 precluded from relying on the newly and untimely disclosed witness at trial.

17     **II. THIS COURT SHOULD EXCLUDE THE BOROUGH’S UNTIMELY  
 18 DISCLOSURES.**

19         **A. The Borough’s January 22, 2008 Disclosure of its Witness was Untimely.**

20         Federal Rule of Civil Procedure 26 requires a party, “without awaiting a discovery  
 21 request,” to provide other parties with “the name, and if known, the address and telephone  
 22 number of each individual likely to have discoverable information – along with the subjects of  
 23 that information – that the disclosing party may use to support its claims or defenses, unless the  
 24 use would be solely for impeachment.” Fed. Rules Civ. Proc. R. 26(a)(1)(A)(i). Rule 26 also  
 25 requires a party to automatically supplement its disclosures whenever it learns that the  
 26 information disclosed is “incomplete or incorrect.” Fed. Rules Civ. Proc. R. 26(e)(1). The  
 27 Court’s Order, Docket 177, recognized that prior disclosure of witnesses was an important

1 element of this litigation, consistent with Rule 26.

2       Initial disclosures under Rule 26 are “designed to facilitate the parties’ understanding of  
 3 the case early on and to inform the appropriate scope of discovery.” *Neothermia Corp. v.*  
 4 *Rubicor Med., Inc.*, 345 F. Supp. 2d. 1042, 1045 (N.D. Cal. 2004). As such, supplements to  
 5 initial disclosures under Rule 26(e) must be made promptly. *Id*; Fed. Rules Civ. Proc. R. 26  
 6 Advisory Committee’s Note (supplementation should be made with special promptness as the  
 7 trial date approaches). Despite the unambiguous mandate in the Federal Rules, and the Court’s  
 8 clear direction in the September 21, 2007 order, the Borough did not disclose its witness during  
 9 the discovery period, but disclosed its witness to Adams for the first time on January 22, 2008 –  
 10 some years after the close of discovery.

11      To ensure compliance with the discovery requirements of Rule 26, Rule 37 provides that  
 12 a party who “fails to provide information . . . as required by Rule 26(a) or (e), . . . is not allowed  
 13 to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the  
 14 failure is substantially justified or is harmless.” Fed. Rules Civ. Proc. R. 37(c)(1). “Exclusion is  
 15 “automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a)  
 16 was either justified or harmless.” *Salgado by Salgado v. GMC*, 150 F.3d 735, 742 (7th Cir.  
 17 1998). Exclusion of undisclosed witness is proper even where the failure to disclose was not due  
 18 to the defendant’s bad faith or willfulness. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259  
 19 F.3d 1101, 1106 (9th Cir. 2001). The Borough’s untimely disclosure, made without notice and  
 20 after the discovery deadline is prejudicial to Adams and without substantial justification. Thus,  
 21 the Borough should be precluded from calling its witness at trial.

22      **B.     The Borough’s Untimely Disclosure Harms Adams and is Without  
 23 Substantial Justification.**

24      The Adams plaintiffs have expended considerable time and expense in developing the  
 25 factual basis of this case. The Borough’s failure to timely disclose its witness is prejudicial to  
 26 Adams’ ability to respond in an adequate and timely manner. The Borough chose to disclose its  
 27 witness only *after* the close of discovery, well after all depositions were taken (depositions which

were attended by the Borough), and after the deadline for filing all final expert reports, and lists of trial exhibits and witnesses. As a result, Adams is deprived of an opportunity to respond to the new evidence before trial. The Borough offers no justification for its failure to disclose its witness. The Borough's failure to comply with the Court's Order of September 21 and with Rule 26 harms Adams and is without substantial justification.

Pursuant to the Court's September 21, 2007 Pre-Trial Order and Rule 37(c)(1), the Borough should be precluded from introducing the untimely disclosed witness at trial. Timely disclosures permit the other side to depose witnesses prior to trial. Here, however, where the witness was not disclosed prior to the end of the discovery period, the Adams plaintiffs did not have an opportunity to determine whether or not to depose the witness before trial.

Adams respectfully seeks an Order excluding testimony from the witness not timely disclosed by the Borough. Respectfully submitted this 29th day of January, 2008.

/S/ Luke Cole

---

Luke Cole  
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January 2008, a true and correct copy of the foregoing Objections to Exhibit List and Motion to Exclude Undisclosed Exhibits was served, via electronic mail, on the below identified parties of record:

Sean Halloran  
Hartig Rhodes  
717 K Street  
Anchorage, AK 99501

Nancy S. Wainwright  
Law Offices of Nancy S. Wainwright  
13030 Back Road, Suite 555  
Anchorage, Alaska 99515-3538

PLAINTIFFS' OBJECTIONS TO  
WITNESS AND MOTION IN LIMINE TO  
EXCLUDE WITNESS

1 James E. Torgerson  
2 Heller Ehrman White & McAuliffe LLP  
3 510 L Street, Suite 500  
4 Anchorage, Alaska 99501-1959

5 David S. Case  
6 Landye Bennett Blumstein LLP  
7 701 W. 8<sup>th</sup> Ave., Suite 1200  
8 Anchorage, AK 99501

9 Thane Tienson  
10 Landye Bennet Blumstein  
11 1300 Southwest Fifth Ave, Suite 3500  
12 Portland, OR 97201

13 

---

/S/ Luke Cole

14 Luke Cole

15

16

17

18

19

20

21

22

23

24

25

26

27

28

PLAINTIFFS' OBJECTIONS TO  
WITNESS AND MOTION IN LIMINE TO  
EXCLUDE WITNESS